

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Dana Lynn Mehen,

Plaintiff,

vs.

Delta Airlines, Inc., et al.,

Defendants.

No. CIV 02-595-TUC-CKJ

ORDER


On September 26, 2005, the Court held a hearing relating to issues pertinent to the upcoming trial in this case. As all of Plaintiff's claims were dismissed from this case on summary judgment, and only Defendants' breach of contract counterclaim remains in this case, the Court ordered the parties to submit briefs addressing whether this case must be tried before the Court or a jury.

The Court has reviewed the parties briefs and finds that this case must be conducted as a bench trial as Plaintiff has waived her right to a jury trial. In response to the Counterclaim filed by Defendants on 9/18/03, Plaintiff failed to timely request a jury trial. Pursuant to FED.R.CIV.P. 38(b), Plaintiff was required to demand a jury trial within 10 days of being served with the jury triable breach of contract counterclaim; Plaintiff failed to do this. *See* Doc. #'s 28, 88, 89. As such, Plaintiff waived her right to a jury relating to Defendants' Counterclaim. *See* FED.R.CIV.P. 38(d)("The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury."). In addition, Plaintiff

1 waived her right to a jury trial in her Pretrial Statement when she stated a jury trial was
2 inapplicable to the Counterclaim. *See* Doc. #164 (Pretrial Statement at 9); FED.R.CIV.P.
3 39(a)(providing that parties can consent to bench trial via a written stipulation); *Zivkovic v.*
4 *Southern California Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002)(holding that pro se
5 party waived his right to a jury trial by failing to file a timely demand for a jury trial). Lastly,
6 the Court notes that Plaintiff failed to request a jury trial in both her initial Complaint filed
7 on 12/6/02 and in her Amended Complaint filed on 5/5/03. *See* Doc. #'s 1, 13. Despite the
8 fact that the various complaints arose out of the same nucleus of facts pertaining to the denial
9 of a disability claim, the first time Plaintiff requested a jury was in another Amended
10 Complaint filed on 6/25/04 pursuant to an Order granting Defendants' motion for a more
11 definite statement. *See* Doc. #'s 1, 13, 16. Lastly, the Court notes that it has limited
12 discretion to order a jury trial despite a party's waiver; however, as is the case here, the Court
13 can not order a jury trial where the failure to timely demand a jury is simply the result of
14 oversight, inadvertence, or lack of familiarity with the rules of procedure. *See Pacific*
15 *Fisheries Corp. v. HIH Cas. & Gen. Ins., Ltd.*, 239 F.3d 1000, 1002 (9th Cir. 2001).

16 Accordingly, the Court finds that Plaintiff has waived her right to a jury trial, and this case
17 shall be tried before the Court.

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23 DATED this 18th day of October, 2005.

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28 Cindy K. Jorgenson
United States District Judge